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No. 1046

In the Supreme Court of the United States

OCTOBER TERM, 1946

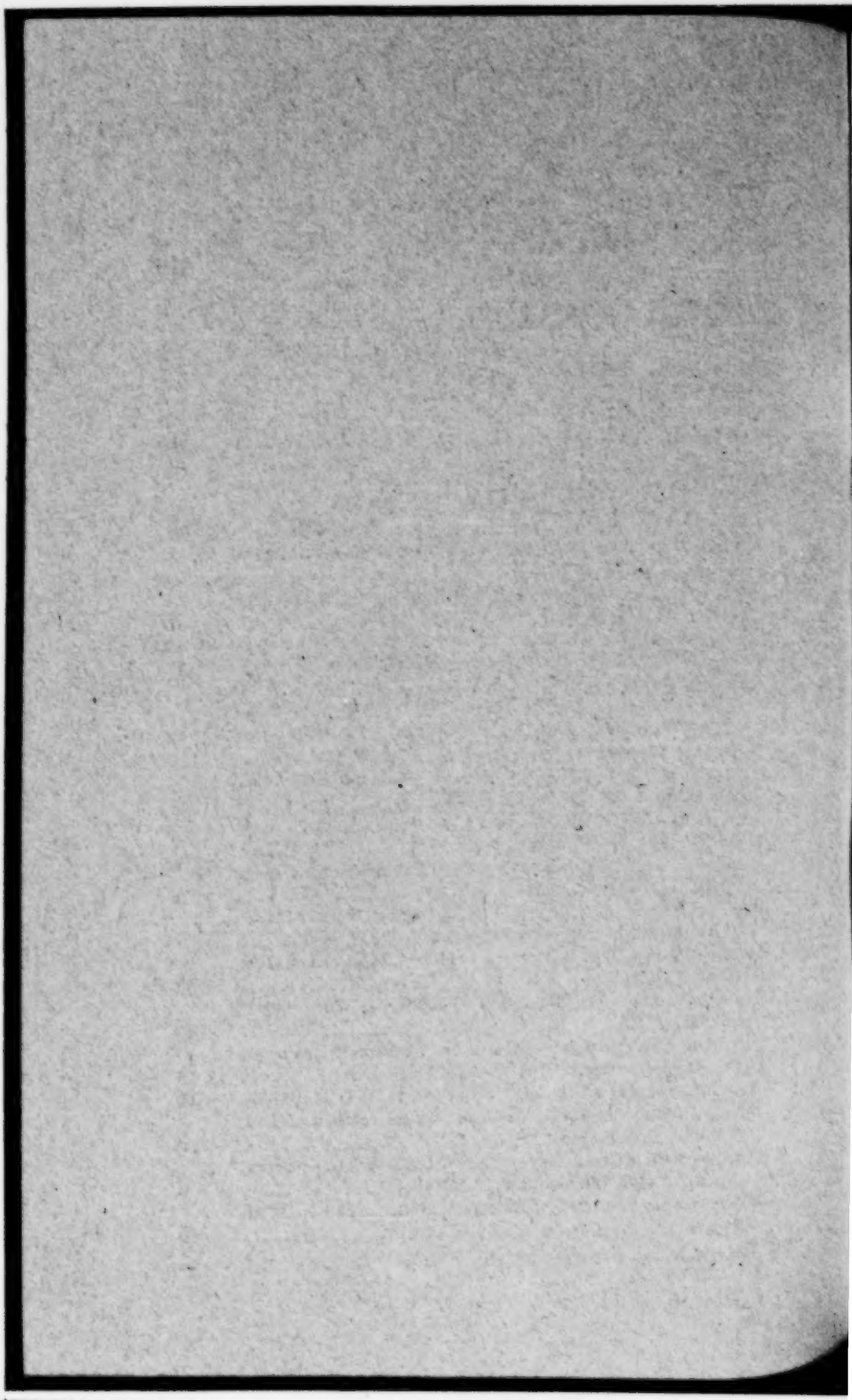
NORFOLK SOUTHERN BUS CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION



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OPINIONS BELOW

The opinions of the court below (R. 160–170) [1] are not yet reported. The findings of fact, conclusions of law, and order of the National Labor

[1] The printed record in this Court consists of the appendices to the briefs in the court below and the proceedings in the court below; references to this printed record are designated "R." Occasional references to the typewritten transcript and exhibits of the unfair labor practice proceeding before the Board, on file with this Court, are designated "C. Tr." and "C. Exh." respectively; those of the representation proceeding, on file with this Court, are designated as "R. Tr." and "R. Exh." respectively.

Relations Board (R. 10–29) are reported in 66 N. L. R. B. 1165. The decision and direction of election in a prior representation case which forms part of the record in this case (R. 1–5) is reported in 60 N. L. R. B. 630. The supplemental decision and certification issued by the Board following the election (R. 6–8) is reported in 61 N. L. R. B. 1591.

JURISDICTION

The decree of the court below (R. 171) was entered on December 30, 1946. The petition for a writ of certiorari was filed on February 20, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTION PRESENTED

Whether the Board properly determined that the bus drivers and conductors employed by petitioner in bus operations in its Virginia division alone, rather than in its Virginia and North Carolina divisions combined, constituted a unit appropriate for collective bargaining, where the operations in the Virginia division are, in many aspects, functionally, administratively and geographically, distinct from petitioner's operations in its North Carolina division, and where the operators of the Virginia division, unlike the North Carolina operators who are hostile to collective

bargaining, have manifested a desire for collective bargaining and have designated a labor organization as their bargaining representative.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix, pp. 17–19.

STATEMENT

In a proceeding under Section 9 (c) of the Act for the investigation and certification of representatives, instituted by Brotherhood of Railroad Trainmen (hereinafter referred to as the Union), the Board, after a hearing, issued a decision and direction of election, on February 15, 1945, finding that all bus drivers and conductors employed in the Virginia division of petitioner's operations, with certain exclusions, constituted an appropriate bargaining unit (R. 1–5). On March 8, 1945, in the election conducted by the Board among the employees in the above described unit, 34 voted for and 30 voted against the Union (R. 6). Petitioner thereafter filed objections to the conduct of the election, asserting, insofar as is material here, that the unit was inappropriate (R. 120–123). On May 29, 1945, the Board issued its supplemental decision and certification of representatives, reaffirming the appropriateness of the unit designated in its prior decision, finding that the Union represented a majority of petitioner's employees in that unit, and certifying the Union as

the statutory representative of such employees (R. 6–8).[2]

Thereafter, in a proceeding under Section 10 (c) of the Act, upon charges filed by the Union, the Board, on March 26, 1946, issued a decision reaffirming its finding, which had been made in the prior decision and direction of election and supplemental decision and certification (*supra*, p. 3), that the bus drivers and conductors of the Virginia division constituted an appropriate bargaining unit; it concluded that petitioner, by refusing to bargain collectively with the certified representative of its employees, as well as by other anti-union conduct, had engaged in unfair labor practices within the meaning of Section 8 (1) and (5) of the Act (R. 12–13, 20–21, 25, 26; 39–42, 50–51, 56). The Board issued an order requiring petitioner to cease and desist from its unfair labor practices and to bargain collectively with the Union (R. 10–11).[3] After appropriate proceed-

[2] The Board also (R. 6–8) overruled petitioner's objections to the election based on its assertion that the Union had engaged in coercion and misrepresentation and that an improper pay-roll period had been used in determining eligibility to vote (R. 121–122).

[3] Petitioner does not here contest (Pet. 8) the validity of the Board's findings, sustained by the court below, that the Union represented a majority of the employees in the unit found to be appropriate by the Board and that petitioner refused to bargain with the duly certified bargaining representative of those employees (R. 21–25, 161); nor does it question either the Board's finding that it engaged in unfair labor practices in contravention of Section 8 (1) of the Act

ings, the court below, on December 30, 1946, issued its opinion affirming the Board's findings and order (R. 160–170), and, on the same day, entered its decree enforcing the Board's order (R. 171).

The evidence in support of the Board's finding that the bus drivers and conductors of petitioner's Virginia division constitute an appropriate bargaining unit, may be summarized as follows:[4]

Petitioner is engaged in the transportation of passengers and freight for hire between certain cities and towns in the eastern sections of Virginia and North Carolina (R. 3; 67–68, R. Tr. 13–14). Petitioner conducts its bus service as two divisions, the Virginia and North Carolina divisions, the busses in each division operating over different routes and covering separate geographical areas (R. 2–3; 71–72, C. Tr. 131, C. Co. Exh. 5, R. Tr. 24). The routes in the Virginia division, with the exception of a five mile extension of one of the

(R. 10, 14–20, 27, 161–163) or that portion of the Board's order, enforced by the court below, which requires petitioner to cease and desist from interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act (R. 10–11, 168). Petitioner's challenge here (Pet. 3) is directed solely to the question of the appropriate bargaining unit.

[4] In the following statement, the references preceding the semicolons are to the Board's findings in the representation proceeding and in the unfair labor practice proceeding, including the intermediate report which was adopted by the Board (R. 10), and succeeding references are to the supporting evidence.

routes into North Carolina, are entirely within Virginia (R. 2–3; C. Tr. 131, 134, R. Tr. 24–25). The routes of the North Carolina division are in North Carolina and between points in Virginia and North Carolina, with the greater part of the runs in the latter State (R. 3; C. Tr. 134, R. Tr. 24–25). Petitioner's operators and conductors are permanently assigned to one division or the other and there is relatively little interchange of regular drivers between divisions (R. 3; R. Tr. 23–24, 52–53, 55, 158–159, 190–191, 196–197); where, in case of an emergency, a regular driver in one division accepts a run in the other division, it is a purely voluntary matter on his part, the opportunity being afforded him as a privilege to earn additional compensation (R. 3; R. Tr. 53–54, 158, 190–191). The seniority lists of the employees are maintained on a division, rather than a company-wide, basis; and an employee who transfers from one division to another goes to the bottom of the seniority list of the new division (R. 3; 71–72, R. Tr. 30–31). Each division is seaprately supervised by individual bus masters (R. 3; 71, 73).

In September 1944, the Union received word that a group of the employees of the Virginia division desired representation by the Union and, accordingly, it instituted an organizational campaign among the drivers and conductors of that division (R. 3, 14; R. Tr. 113, 128, 131–132, 146). A number of bus operators joined the Union (R. 14; 37, R. Tr. 144). Upon being informed by the Virginia division employees that the North Caro-

lina employees were opposed to organization, the Union made no effort to sign up employees in the latter division (R. 3; R. Tr. 113–114, 122, 128–129, 145–147).[5]

There has never been any collective bargaining between petitioner and its employees on either a division-wide or company-wide basis (R. 3).[6] While wages and working conditions are the same throughout the system and employment policies generally are handled centrally (R. 3; 74; 80), factors which, as the Board observed in its decision and direction of election (R. 3), "point up the equal propriety of a company-wide unit," the Board concluded (R. 3) that at the present stage of organization of petitioner's employees a unit confined to bus drivers and conductors in the Virginia division was appropriate. The rationale underlying this conclusion is stated in the Board's decision and direction of election as follows (R. 3):

> * * * the Union has limited its organizational activities to employees of the Virginia division since those in the North

[5] Practically all the drivers in the North Carolina division signed a petition indicating that they did not desire to be represented by the Union (R. 3, n. 3; 9, R. Tr. 113–114).

[6] Although Bus Master Addenbrook testified that on two occasions while he was still an operator, the employees in both divisions joined in petitions to petitioner for adjustments of wages which were granted (R. 112–115), his testimony falls short of establishing that there ever was any genuine collective bargaining between petitioner and its employees.

Carolina division have indicated their hostility to the Union and there is no present possibility of organizing the latter division. In view of the foregoing, and in the absence of any bargaining history, we are of the opinion that at this time a unit confined to employees of the Virginia division is appropriate. We do not thereby preclude reconsideration of the appropriateness of a larger unit, should organization of the company's employees be extended.

ARGUMENT

Petitioner contends (Pet. 1–2, 3, 7–8) that the Board exceeded the limits of its discretion in determining that the bus drivers and conductors in petitioner's Virginia division constituted an appropriate collective bargaining unit within the meaning of Section 9 (b) of the Act, urging that only an employer-wide unit, consisting of the Virginia and North Carolina divisions, could be found appropriate for the purposes of collective bargaining. This contention does not raise any novel issue before this Court; and the decision of the court below, sustaining the Board's findings, is in accord with the rulings of this and other courts.

The governing statutory standard by which the Board is to be guided in determining the appropriate unit "in each case" is that of insuring to the employees involved "the full benefit of their right to self-organization and to collective bar-

gaining" and otherwise effectuating the policies of the Act (Section 9 (b)). The power to designate the unit appropriate for collective bargaining is thus a broad discretionary one. If the Board has, in the exercise of its discretion, made its determination, based upon relevant considerations which show a reasonable basis for its conclusion that the unit designated as appropriate will effectuate the policies of the Act, the finding will not be overturned on review. *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board,* 113 F. 2d 698, 701 (C. C. A. 8), affirmed 313 U. S. 146; *National Labor Relations Board* v. *Hearst Publications, Inc.,* 322 U. S. 111, 134–135; *May Department Stores Co.* v. *National Labor Relations Board,* 326 U. S. 376, 380; *Packard Motor Car Co.* v. *National Labor Relations Board,* No. 658, this Term.

The evidence upon which the Board based its appropriate unit finding in this case clearly showed that the Virginia division operators and conductors constitute a homogeneous, identifiable body of persons working in an area separate from the North Carolina operators and that the Virginia employees, in many respects, are treated and recognized by petitioner as a group distinct from the employees in the North Carolina division. The Board, also, properly took into consideration the fact that unless the Virginia division employees were found to constitute an appropriate

unit, these employees, who have manifested a definite and unmistakable desire for collective bargaining, would be denied the right to "self-organization and collective bargaining" (Section 9 (b) of the Act) until a similar course of action was chosen by the North Carolina division employees who have not only evidenced no interest in bargaining collectively, but, in fact, have clearly indicated that they are opposed to representation by the Union. The Board was thereby following its established policy [7] of considering the "extent of organization" among employees. This principle has received the approval of this Court and has been consistently sanctioned by the circuit courts of appeals. Thus, in *National Labor Relations Board* v. *Hearst Publications, supra,* this Court, upholding a unit determination based upon the

[7] As early as 1937 the Board stressed the "extent of organization" factor in its unit determinations, in order to extend the benefits of collective bargaining under the Act to those persons who have indicated a desire therefor, subject, of course, to certain limiting safeguards. *Matter of R. C. A. Communications, Inc.*, 2 N. L. R. B. 1109, 1115; *Matter of Chase Brass and Copper Company, Inc.*, 4 N. L. R. B. 47, 49–51; *Matter of Gulf Oil Corporation*, 4 N. L. R. B. 133, 137. The "extent of organization" principle has been reiterated since then, in a long series of decisions. See, e. g., *Matter of New England Spun Silk Corp.*, 11 N. L. R. B. 852, 855; *Matter of Burroughs Adding Machine Co.*, 14 N. L. R. B. 829, 832; *Matter of Fuld and Hatch Knitting Co.*, 30 N. L. R. B. 1133, 1135–1136; *Matter of Carolina Scenic Coach Lines*, 33 N. L. R. B. 528, 530–532; *Matter of Sunset Motor Lines*, 59 N. L. R. B. 1434, 1436; *Matter of Public Service*

"extent of organization" principle, stated (at p. 134–135):

> Among the considerations to which it [the Board] has given weight [in making its determination of the appropriate unit] is the extent of organization of the union requesting certification or collective bargaining. This is done on the expressed theory that it is desirable in the determination of an appropriate unit to render collective bargaining of the company's employees an immediate possibility. No plausible reason is suggested for withholding the benefits of the Act from those here seeking it until a group of geographically separated employees become interested in collective bargaining.

See, also, *May Department Stores* v. *National Labor Relations Board,* 326 U. S. 376, 379, 380; *National Labor Relations Board* v. *Botany Worsted Mills,* 133 F. 2d 876, 880 (C. C. A. 3), cer-

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Company of Colorado, 60 N. L. R. B. 109, 111–112; *Matter of Banco Popular de Puerto Rico (Santurce Branch)*, 61 N. L. R. B. 676, 678–679; *Matter of Miller & Miller Motor Freight Lines*, 63 N. L. R. B. 594, 595; *Matter of Standard Oil Company of California*, 63 N. L. R. B. 471, 476–477; *Matter of The Bailey Company*, 66 N. L. R. B. 899, 901; *Matter of Endicott Johnson Corporation*, 67 N. L. R. B. 1342, 1346. See, also, Board's *Third Annual Report*, pp. 157–158; *Fourth Annual Report*, pp. 83–84; *Seventh Annual Report*, p. 59; *Eighth Annual Report*, p. 53; *Ninth Annual Report*, p. 33; *Tenth Annual Report*, p. 27; *Eleventh Annual Report*, pp. 23–24.

tiorari denied, 319 U. S. 751; *National Labor Relations Board* v. *Lettie Lee, Inc.*, 140 F. 2d 243, 247–248 (C. C. A. 9); *National Labor Relations Board* v. *Prudential Insurance Company of America*, 154 F. 2d 385, 386, 388–389 (C. C. A. 6).

Petitioner's repeated assertion, throughout the proceedings and before this Court (Pet. 7–9), that the Virginia division employees are, in many aspects, similar to the North Carolina division employees, and that, therefore, both divisions constitute the only appropriate unit, misconceives the fundamental purpose of the "extent of organization" principle as applied by the Board and approved by this Court. Indeed, it is the presence of such factors as, to some extent, indicate the similarity of all employees in the more inclusive unit and as militate in favor of an overall unit, which calls for the promulgation and application of a principle of "extent of organization" in the determination of an appropriate unit. It is this similarity which gives rise to the alternative larger unit which is theoretically also appropriate. Were not those factors of integration present, the question of "extent of organization" would not arise and the smaller unit would be the only appropriate unit, irrespective of the existence of other divisions or departments or segments of employees; eliminate those characteristics of similarity and the alternative larger unit could not

be supported, even in conjecture. The Board in establishing a smaller unit as an appropriate unit,[8] and the courts, in sustaining the Board,[9] have recognized that there are present certain factors which "point up the equal propriety" (R. 3) of a larger unit; nevertheless, in order to effectuate the policies of the Act and in order not to withhold the benefits of the Act from a smaller group of employees until the uncertain date when the employees in the larger unit may indicate their willingness to embrace the right of self-organization, the Board has, in the exercise of its discre-

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[8] See cases cited in footnote 7, *supra*.

[9] Thus, in *National Labor Relations Board* v. *Hearst Publications, Inc.*, *supra*, this Court sustained the Board's unit finding which embraced the newsboys engaged in selling newspapers within Los Angeles and the suburb of Glendale, California, although newsboys similarly engaged in other Los Angeles suburbs were not included. In *May Department Stores Company* v. *National Labor Relations Board*, *supra*, this Court had before it, as did the Board, "the treatment of all employees as a unit by management with reference to sick leave, hospitalization, employee privileges, vacations, et cetera. * * * It had testimony as to similarity and dissimilarity in tailoring and altering between the men's and women's alteration rooms * * * [and] * * * the interchange of workers between the two groups." Similarly, in *National Labor Relations Board* v. *Prudential Insurance Company of America*, *supra*, the circuit court of appeals sustained the Board's unit finding which embraced the insurance agents of the Toledo area who performed functions identical with those of the agents of the State-wide area, although the Board had acknowledged the feasibility of a State-wide unit.

tion, set up the smaller unit as an appropriate unit, thereby making collective bargaining an immediate possibility for those employees who have indicated such desire, provided those employees comprise a sufficiently homogeneous, identifiable and distinct group by themselves.

Petitioner, further, contends (Pet. 9) that the unit determination by the Board, which presently permits the employees of the Virginia division to exercise the rights guaranteed in Section 7 of the Act, will, thereby vest them with control over the employees of the North Carolina division. This conclusion is obviously a *non sequitur*. As we have shown (*supra*, pp. 5–6), the employee group designated as an appropriate unit bears certain characteristics which render it distinct and separable for the purposes of collective bargaining. It is therefore completely feasible for petitioner to bargain collectively with it as a unit. The Union, having been duly designated and selected by a majority of the employees in the Virginia division and having been certified as such by the Board, will, pursuant to Section 9 (a) of the Act, be the exclusive representative of all employees in the unit found by the Board to be appropriate for collective bargaining. Petitioner, at this time, is under no obligation to recognize the Union as the representative of the North Carolina division employees, nor may the Union compel petitioner to deal with it in respect to the condi-

tions of employment of the latter employees. See *National Labor Relations Board* v. *Appalachian Electric Power Company*, 140 F. 2d 217, 219 (C. C. A. 4). While it is true that the organization of the Virginia division employees may, indirectly, affect petitioner's relations with the North Carolina division employees and may, to some extent, influence the conditions of employment of those employees, that effect is the normal result of the organization of any group of employees engaged in the same industry and would flow whether the employees organized were those of petitioner or those of another employer in the locality. Petitioner's argument, if carried a step further, would militate against any unit finding short of an industry wide basis, inasmuch as the organization of any one plant of any one employer would, indirectly, affect the bargaining relations between the employees and employer in other plants. This follows from the interrelation and integration of industry and the cohesive nature of the labor movement, as a whole, and the economic forces which are brought into play.

CONCLUSION

The decision of the court below is correct. It involves no conflict of decision and merely sustains an exercise by the Board of its discretionary powers. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1947.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C., sec. 151 *et seq.*) are as follows:

> SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce * * *
>
> * * * * *
>
> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.
>
> * * * * *
>
> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To imterfere with, restrain, or coerce employees iin the exercise of the rights guaranteed in sæction 7.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunc-

tion with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

* * * * *

SEC. 10. (e) * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

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